In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

UNITED STATES OF AMERICA, PETITIONER

v.

TOMMY HIETT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, entered on August 26, 1969, reversing respondent's conviction under 18 U.S.C. 1714 on the ground that the statute was invalid in that it violated the First Amendment.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 6-25) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 26) was entered on August 26, 1969. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including October 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in holding unconstitutional 18 U.S.C. 1714, which prohibits the use of the United States mails to distribute written material "giving or offering to give information concerning where or how or through whom a divorce may be secured in a foreign country and designed to solicit business in connection with procurement thereof."

STATUTE INVOLVED

18 U.S.C. 1714 provides:

> Every written or printed card, circular, letter, book, pamphlet, advertisement, or notice of any kind, giving or offering to give information concerning where or how or through whom a divorce may be secured in a foreign country, and designed to solicit business in connection with the procurement thereof, is nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly deposits, for mailing or delivery, anything declared by this section to be

nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, shall be fined not more than $5,000 or imprisoned for not more than one year, or both.

STATEMENT

After a non-jury trial in the United States District Court for the Western District of Texas, respondent was convicted on two counts of using the United States mail for giving or offering to give information designed to solicit business in connection with the procurement of divorces in foreign countries, in violation of 18 U.S.C. 1714 (R. 164). He was sentenced to five months' imprisonment on the first count and fined $5,000 and given a suspended sentence of one year on the second count (R. 175-177).

The case was submitted to the trial judge on an agreed statement of facts (R. 38-40; 144-163). In September 1962, respondent rented a post office box in his name in El Paso, Texas, and described his business as "Mexican divorces." The next month a criminal complaint was filed against respondent, charging him with a violation of 18 U.S.C. 1714. He was arrested, the statute was read to him and he was released on an appearance bond. The following year, respondent declined to send information about Mexican divorces to an inquirer, stating that the cited statute prohibited his doing so (R. 39). In 1967, however, he mailed two letters, in response to inquiries, outlining procedures and fees and containing the necessary forms to secure a Mexican divorce (R. 39-40; 145-163). These mailings underlie the present case.

The court of appeals reversed respondent's conviction, holding that the statute in question was unconstitutional in that it was violative of the First Amendment (App. A, *infra*, p. 6).

REASONS FOR GRANTING THE WRIT

Despite the legislative purpose of 18 U.S.C. 1714—to prevent commercial advertising promoting the procurement of fraudulent foreign divorces (see H. Rep. No. 1370, 76th Cong., 1st Sess.; S. Rep. No. 683, 76th Cong., 1st Sess.)—the court below struck down the statute on the ground that its use of the undefined word "solicitation" resulted in an overly pervasive ban which improperly curtailed the expression of speech protected by the First Amendment. While we agree with the statement of the court below that "* * * the use of the mails is not a privilege to which the Congress or the Post Office can attach any condition it chooses" (App. A, *infra*, pp. 14-15), it is our position that the statute is a reasonable regulation of commercial advertising through the mails (see *Valentine* v. *Chrestensen*, 316 U.S. 52, 54). Moreover, the word "solicitation," while not defined in the statute, is a commonly used word in everyday conversation and is not so vague that "men of common intelligence [need] guess at its meaning." *Connally* v. *General Const. Co.*, 269 U.S. 385, 391.

We understand that this is the first prosecution under this statute since it was originally enacted in 1939; nevertheless, the wisdom and utility of laws are matters reserved for the legislative branch and we believe the broad ruling invalidating an Act of

Congress should not be accepted until submitted to the consideration of this Court. Significantly, if the ruling of unconstitutionality had been made by the *district court*, a direct appeal to this Court would have been available to the government. 18 U.S.C. 3731.

In sum, we question the correctness of the decision of the Fifth Circuit in this case, and, since that court has held that an Act duly passed by Congress is unconstitutional, we believe plenary review by this Court would be appropriate.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
KAREN L. ATKINSON,
Attorneys.

OCTOBER 1969.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25732

TOMMY HIETT, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Western District of Texas

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(August 26, 1969)

Before THORNBERRY and SIMPSON, Circuit Judges, and CASSIBRY, District Judge.

THORNBERRY, Circuit Judge: This is an appeal from a judgment of conviction under 18 U.S.C. § 1714 (1964), which prohibits the use of the United States mails to distribute written material "giving or offering to give information concerning where or how or through whom a divorce may be secured in a foreign country, and designed to solicit business in connection with the procurement thereof." Appellant contends that this statute is unconstitutional in that it violates the first amendment. We agree and reverse his conviction.

The case was tried without a jury on stipulated facts. Appellant admitted that he had been doing business as Mexico Divorce Consultants, Ltd., at El Paso, Texas, in association with attorneys licensed to practice law in Mexico. Having received inquiries from persons who purported to be interested in securing divorces, he replied by placing in the United States mails letters offering the services of his firm and explaining the procedures to be followed in obtaining both bilateral and ex parte Mexican divorces. Since appellant thus admitted all elements of the offense, he was found guilty as charged on two counts of violating § 1714. The trial court overruled his contention that the statute was unconstitutional. He was sentenced to five months' imprisonment on the first count and fined $5,000 and given a suspended sentence of one year on the second.

The challenge of unconstitutionality against § 1714 presents two main issues. The first is whether Congress may selectively exclude printed matter from the mails, irrespective of its status under the first amendment, solely on the basis of the power to "establish Post Offices and post Roads." U.S. CONST. Art. I § 8. The second issue is whether § 1714 is a law "abridging the freedom of speech" within the meaning of the first amendment.

I. THE APPELLANT'S CONDUCT AND ITS RELEVANCE

Before considering the Constitutional issues involved here, we eliminate one question. Appellee points out that when § 1714 was enacted in 1939, the principal evil against which it was directed was the fraudulent solicitation of Mexican divorces that often proved, to the parties' dismay, to be invalid in the United States. Appellee argues that appellant's con-

duct in this case presents precisely the evil the statute was enacted to prevent. There were statements in appellant's letters to the effect that "[m]ost courts recognize Mexican divorces as valid," and that service on the spouse for an ex parte divorce could be had by publication. These statements, appellee argues, were misrepresentations because (1) Mexican bilateral divorces were actually *invalid* in every state of the Union except New York and possibly Arizona and Alabama, *see* Annot., 13 A.L.R.3d 1419, 1425, 1441 (1967), and (2) not even New York recognized ex parte divorces in which one party was "served" by publication, *see Rosenstiel* v. *Rosensteil*, N.Y. App. 1965, 16 N.Y.2d 64, 262 N.Y.S.2d 86, 209 N.E.2d 709.

Appellant's actual conduct, however, is largely irrelevant here. His attack is on the face of the statute itself. He admits violation of the terms of § 1714, and his conduct is therefore not in issue except as it may furnish an aid to our determining the breadth of application of the statute. It is well settled that if the statute under which appellant has been convicted is unconstitutional, he has not in the contemplation of the law engaged in criminal activity; for an unconstitutional statute in the criminal area is to be considered no statute at all.

Beyond this well-establish truth, there is another good reason for our not considering appellant's conduct, and that is that we have no standards by which to do so. Section 1714 indiscriminately prohibits the mailing of certain types of communications, without regard to fraudulent intent. Furthermore, although appellant's statements may have been misleading, there is not a scintilla of evidence in the record indicating any of the elements of fraud. Under the circumstances, these misleading statements may have

been honest mistakes as to the law made by an attorney who drafted the letters, or, worst yet, statements that were conceivably true for some limited purposes, the misleading tendencies of which the attorney did not see. *Cf.* 37 C.J.S. *Fraud* § 3 (1943). Accordingly, the conviction must stand or fall on the constitutionality of § 1714 alone, and we proceed now to the Constitutional questions.

II. The Effect of the Postal Power

We are met at the outset with appellee's contention that Congress may exclude "objectionable" materials from the mails merely on public policy grounds even if it would be under a disability to regulate the existence of the materials themselves or the underlying scheme for which they are used. On this basis, appellee concludes that Congress can prohibit the use of the mails to send out information to solicit divorces, even assuming it is unable, under any of its powers, to outlaw the solicitation itself. We reject this argument and hold that a statute excluding printed communications from the mails must be tested for consistency with the first amendment.

The postal power has been construed with great variation throughout its history, and there is an abundance of dicta that would support appellee's contentions if construed in the absence of more recent decisions. Originally, the power was viewed with a narrowness that today seems surprising. In one early case, the power was limited strictly to "the designation of roads on which the mails are to be transported." *United States* v. *Railroad Bridge Co.*, C.C. N.D. Ill. 1855, 27 Fed. Cas. 686. After 1876, however, the pendulum swung the other way, and the postal power was given rapidly expanding latitude. *See Kohl* v. *United States*, 1876, 91 U.S. 367, 23

L.Ed. 449; Legislative Reference Service, Library of Congress, *The Constitution of the United States of America; Analysis and Interpretation* 313 (1964). The pioneer case of *Ex parte Jackson*, 1878, 96 U.S. 727, 24 L.Ed. 877, upheld the first Congressional use of the power to influence public policy aims. The Supreme Court established a broad postal power: It affirmed a conviction under a statute excluding lottery information from the mails, on the theory that "[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded." Although *Ex parte Jackson* also emphasized the "necessity of enforcing [the postal laws] consistently with the rights reserved to the People, of far greater importance than the transportation of the mail," the decision spawned a line of cases indicating in dictum that the postal power includes an absolute power of censorship. These cases, in contract to the original narrow interpretation given the post-roads clause, developed the "privilege" doctrine: They viewed the use of the mails as a privilege to which "Congress may annex such conditions . . . as it chooses." *Public Clearing House* v. *Coyne*, 1904, 194 U.S. 497, 24 S.Ct. 789, 48 L.Ed. 1092; *see also Ex parte Rapier*, 1892, 143 U.S. 110, 12 S.Ct. 374, 36 L.Ed. 93; *McCrossen* v. *United States*, 10th Cir. 1965, 339 F.2d 810.

Today, whatever the status of the privilege doctrine, the cases establish beyond doubt that the postal power may be used broadly to achieve social and economic results that Congress deems beneficial. For example, the power unquestionably may be used to exclude utterances that are not protected speech on a judgment by Congress that they are harmful. *See, e.g., Parr* v. *United States*, 1960, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (mail fraud); *Roth*

v. *United States*, 1957, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (obscenity). It may be used to enforce economic regulatory schemes such as the securities laws. *Electric Bond & Share Co.* v. *SEC*, 1938, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936. Congress evidently even has the power to encourage certain categories of speech over others when it deems that the public interest will be served by its doing so, since it has "a broad power of classification and need not open second class mail [which is less expensive] to publications of all types." *Hannegan* v. *Esquire, Inc.*, 1946, 327 U.S. 146, 66 S.Ct. 456, 90 L.Ed 586. In short, today the permissible use of the postal power is similar in breadth to the uses to which the commerce and tax powers have been put. *See* Sigler, *Freedom of the Mails: A Developing Right*, 54 GEO. L.J. 30, 37 (1965).

However, it is one thing to say, as the cases hold, that a power of Congress may legitimately be used to protect the public health, safety, welfare, or morals, and quite a different thing to say, as appellee apparently says, that its use for police power purposes automatically overrides the specific limitations on Congressional power that are contained in the Bill of Rights. Admittedly, the freedom of speech is not absolute; but neither may the powers of Congress, even though delegated by the Constitution, be regarded as absolute, since they would obliterate the first amendment if asserted to their logical extreme. Thus both the commerce power and the tax power have been held to be circumscribed by the first amendment. *See Red Lion Broadcasting Co.* v. *FCC*, 1959, 89 S.Ct. 1794; *Murdock* v. *Pennsylvania*, 1943, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292. Similarly, regulation of speech through the postal power, although it is authorized where necessary to effect legitimate

legislative ends, is to be tested against the first amendment. Recognition of this first amendment limitation has been slow in developing, partly, because of the lingering presence of the privilege doctrine. The cases still contain troublesome, atavistic language that implies an absolute power of censorship. As recently as 1965, for example, Tenth Circuit stated as follows:

> Under Art. 1, § 8, cl. 7 of the Constitution, Congress has the power to "* * * establish Post Offices and post Roads." It has long been the law that this power embraces the regulation of the entire postal system and includes, within constitutional limitations, the right to determine what may be carried in the mails and what may be excluded. Public Clearing House v. Coyne, 194 U.S. 497, 24 S.Ct. 789, 48 L.Ed. 1092; Ex parte Rapier, 143 U.S. 110, 12 S.Ct. 374, 36 L.Ed 93; In re Jackson, 96 U.S. 727, 24 L.Ed. 877. Congress has exercised that power by providing in section 1718 that certain types of material shall be considered to be nonmailable matter. Therefore, the prohibitions contained in that statute must be construed in the light of the regulatory power of Congress rather than in the light of any First Amendment limitation. In other words, in our consideration of this case, we must keep in mind that the gist of an offense under section 1718 is not the making and uttering of the prohibited writing. It is the depositing in the United States mail of an envelope containing on the outside thereof the prohibited writing. The statute is not, by its express terms, limited solely to "libelous" statements. It encompasses also statements which are "scurrilous," "defamatory" or calcu-

> lated and obviously intended to reflect injuriously upon the character or conduct of another. It may be conceded, therefore, that statements claimed to be libelous must be measured by the law of libel and it has been so held. American Civil Liberties Union v. Kiely, 2 Cir., 40 F.2d 451. But, that does not mean that the other types of prohibited statements must be construed in the light of the law of libel. To the contrary, we think that writings on envelopes may be prohibited by Congress under its regulatory power even though they are not strictly libelous.

McCrossen v. *United States*, 10th Cir. 1965, 339 F.2d 810, 813. The *McCrossen* court went on to hold that the mailing of an envelope with words strongly critical of President Eisenhower printed on its cover was constitutionally made criminal by 18 U.S.C. § 1718 (1964). One problem with this privilege approach is that today the use of the mails is not a mere convenience but a *sine qua non* for many types of communications. To cite an extreme example, absolute power to exclude a magazine from the mail arbitrarily would not be regulatory power; it would be, like the power to levy oppressive taxes, the power to destroy.

We find that the trend of cases, and especially the more recent decisions of the Supreme Court, has given the privilege doctrine the burial it merits. The need for Congress to respect the provisions of the Bill of Rights in the exercise of the postal power has long been emphasized. *Ex parte Jackson*, 1878, 96 U.S. 727, 24 L.Ed. 877; *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 1921, 255 U.S. 407, 41 S.Ct. 352, 65 L.Ed 704 (Holmes dissent); *Roth* v. *United States*, 1957, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (by implication); *Han-*

negan v. *Esquire, Inc.*, 1946, 327 U.S. 146, 66 S.Ct. 465, 90 L.Ed. 586; *Manual Enterprises* v. *Day*, 1962, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639; *Lamont* v. *Postmaster General*, 1965, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398. The now-famous Holmes dissent in *Milwaukee Social Democratic Pub. Co.* states that "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." In another dissent, in the *Roth* case, Mr. Justice Harlan wrote: "The hoary dogma of Ex parte Jackson . . . and Public Clearing House v. Coyne . . . that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated." In *Roth*, if not in *Milwaukee*, the majority clearly agreed, because it discussed at length the question whether obscene materials sent through the mail constituted protected speech, an inquiry that would have been meaningless had the Court subscribed to the privilege doctrine. *See also Ginzburg* v. *United States*, 1966, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31. In *Lamont*, the latest pronouncement of the Supreme Court on the matter, the Court held a statute requiring detention of Communist propaganda mail from foreign countries unconstitutional as applied because the addressee had to return a special card to the Post Office in order to receive each such piece of mail addressed to him. Citing the Holmes dissent in *Milwaukee Social Democratic Publishing Co.*, the Court stated: "We conclude that the Act as construed and applied is unconstitutional . . . as a limitation on the unfettered exercise of the addressee's first amendment rights."

In light of these cases, we hold that the use of the mails is not a privilege to which the Congress or the

Post Office can attach any condition it chooses. When a postal law affects expression, the exercise of the postal power must be tested against the first amendment. This does not mean, of course, that no printed matter may be excluded; for we recognize that the postal power is a broad one that extends not only to the designation of post offices and post roads, but also to the regulation of the mails for public policy purposes. It does mean, however, that a statute affecting expression, even if enacted under the postal power, is constitutional only if either (1) it meets the twin tests of specificity and narrowness or (2) the expression it affects is not protected speech.

III. The Effect of the First Amendment

We come, therefore, to the second issue in this case: Whether § 1714 is consistent with the first amendment. At the outset, there can be no doubt that the statute infringes some expression. It defines all information about foreign divorces designed to solicit business in procuring a divorce as non-mailable matter, regardless of its truth or falsity, regardless of relationship of the parties between whom it is sent, and without limitation as to whether the addressee has requested the information. In testing § 1714 against the first amendment, we must first ascertain whether the expression it infringes has any Constitutional protection as speech. If so, we must then determine whether it measures up to the strict standards that statutes regulating speech must meet in order to stand.

A. *Information and Solicitation Concerning Legal Rights as Protected Speech*

Appellee contends that the solicitation of foreign divorces "is not a form of speech entitled to first

amendment protection, just as obscene or abusive language, threats, or fighting words are not protected." If this were true, we would agree without further discussion that such communications could be excluded from the mails. It is well established that "[t]here are certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the libelous, and the insulting or " 'fighting' words—*those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.*" *Chaplinsky* v. *New Hampshire*, 1942, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (emphasis added). It follows as a corollary that these utterances can be censored from the mail. *Cf. Parr* v. *United States*, 1960, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed2d 1277.

We do not find that information about the exercise of legal rights, even when it relates to the procurement of a divorce in a foreign country, may be summarily censored "without raising any Constitutional problem" in the same manner as obscenity, fraud, libel, or threats, especially when the information has been requested by the addressee. It may well be that the giving of such information could be regulated, or conceivably, under certain circumstances, prohibited entirely, but this is not because the information is not "speech," and any regulation would have to be effected by a statute drawn with narrow specificity and aimed at protecting only overwhelmingly important interests that the legislature is charged with protecting. We find no basis for appellee's contention that an undiscovered lode of unprotected expression, similar to other long-established exceptions to the first amendment, has awaited our finding it in this

case. Moreover, if the test for such a category of expression is, as stated in *Chaplinsky*, that "by [its] very utterance [it] inflict[s] injury or tend[s] to incite an immediate breach of the peace," we can find no justification for establishing one here. In fact, recent decisions of the Supreme Court indicate that "solicitation" is an area fraught with Constitutional problems of the first magnitude, because it involves definite pockets of protected speech. *See Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 1964, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89; *N.A.A.C.P.* v. *Button*, 1963, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405; *Thomas* v. *Collins*, 1945, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 431. We conclude that this statute must be reconciled with the first amendment if it is to be considered constitutional.

B. *Section 1714 as Considered against the First Amendment*

(1) *The Problems of Vagueness and Overbreadth.* A criminal statute affecting expression protected by the first amendment must meet two stringent requirements. The first of these is the test of specificity: The statute will be held void for vagueness unless it defines the area of illegal conduct with sufficient specificity so that "men of common intelligence [need not] guess at its meaning." *Connally* v. *General Constr. Co.*, 1926, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322. This requirement, in fact, is imposed upon all criminal statutes, but it is especially crucial in the first amendment area. *See Joseph Burstyn, Inc.* v. *Wilson*, 1952, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 687; *Kingsley's Int'l Pictures Corp.* v. *Regents of New York*, 1959, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512. Thus in ordinary criminal matters

Government may balance its police power interests against the individual's right to notice of illegality and definition of the crime, but such balancing is looked upon with far less favor when it affects speech. *Compare Nash* v. *United States*, 1932, 229 U.S. 373, 33 S.Ct. 780, 572 L.Ed. 1232 (Sherman Act prohibitions on "restraint of trade" held sufficiently specific for criminal convictions) (Holmes, J.) *with Winters* v. *New York*, 1949, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed 840 (statutory ban on publications "so massed as to incite to violent and depraved crimes" held void for vagueness); *see also Joseph Burstyn, Inc.* v. *Wilson, supra* (term "sacrilegious" as a standard for moving picture censorship held void for vagueness). The strictness of these decisions has been explained thus by the Supreme Court:

> [S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.

Smith v. *California*, 1959, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205. There is another reason for holding vague statutes void, and that is that they furnish insufficient checks on Government discretion. *Cantwell* v. *Connecticut*, 1940, 310 U.S. 369, 60 S.Ct. 900, 84 L.Ed. 1213; *Herndon* v. *Lowry*, 1936, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; *see* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.P.A. L. REV. 67 (1960).

We find that § 1714 is vague in its language "designed to solicit business in connection with the procurement thereof." "Solicitation" is nowhere further defined; and as we have pointed out § 1714 defines all

information about foreign divorces designed to solicit business in procuring a divorce as non-mailable matter, without limitation as to whether the addressee has requested the information, regardless of its truth or falsity, and regardless of the relationship between the parties. In the case at bar, in fact, the information was sent in response to inquiries. We can easily see, if the statute can apply to the case at bar (and from the wording of the statute we cannot say that it does not), that an attorney writing to a client of long standing to discuss a question regarding a foreign divorce, even one that the parties had already contemplated in a face-to-face meeting, could realistically be uncertain whether he was violating the statute. The trial court was concerned that such businesses as airlines and hotels might unwittingly violate § 1714 by advertising or service to customers. These may be reasonable interpretations of the statute as it is written. The House report that accompanied the bill, for example, quoted a letter that stated as follows:

> The enactment of the proposed measure is urgently recommended as it would clear the mails of advertisements, letters, circulars, and other written and printed matter containing misrepresentations not only of fact but also of law, encouraging the obtaining of invalid divorces, and would tend to put an end to these corrupt practices which are contrary to good morals and the general welfare of society.

H.R. Rep. No. 1370, 76th Cong., 1st Sess. (1939). Likewise, the Senate report attributes to the Act a sweeping, indefinite reach:

> The bill designates as nonmailable all written or printed matter sent through the mails for the

> purpose of inducing any person to resort to the courts of a foreign country to obtain a divorce, and makes it an offense for anyone to use the mails for the transmission of such nonmailable data.

S. Rep. No. 683, 76th Cong., 1st Sess (1929). In short, because the meaning of "solicitation" is not clear, anyone who sends foreign divorce information through the mails to another with whom he has a business relationship cannot be certain whether his conduct is legal or not. As a statute affecting speech, § 1714 fails to measure up to a strict standard of specificity.

A second test of a statute regulating speech is that it may not encroach unduly upon protected first amendment interests. This doctrine of overbreadth is closely related to the vagueness doctrine, because indefinite laws tend to be overly broad as well, in that they not only provide insufficient notice of illegality but sometimes include within their prohibitions expression that is protected speech. The legislature cannot constitutionally use a "blunder-buss" approach that sweeps in wide areas of protected speech even if its goal is to eradicate an evil undeniably caused by a smaller included area of unprotected expression; it cannot simply decide that "a certain kind of speech [is], itself, harmful and unlawful." *Dennis* v. *United States*, 1951, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (clear and present danger test); *overruling Gitlow* v. *New York*, 1925, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 ("bad tendency" test). § 1714 is aimed primarily at fraud, an evil which the legislature unquestionably should be concerned with eliminating. But we find that § 1714, in its blanket prohibition of divorce information mailed in connection with solicitation of business, is not only vague in

failing to give notice of illegality or define the crime but sweeps too broadly in that it would interfere not only with fraud but with lawyers attempting to advise clients of their legal rights. *Cf. Brotherhood of Railroad Trainmen* v. *Virginia, supra; N.A.A.C.P.* v. *Button, supra.* Furthermore, inasmuch as the statute might apply to mail that the addressee has requested (or might want, even if he has not requested it), it encroaches on the addressee's right to receive information, under *Lamont* v. *Postmaster General, supra.*

(2) *Balancing the Encroachment on Speech against the Public Interest.* Even though we have found some encroachment on speech through both vagueness and overbreadth, our inquiry is not completed. The freedom of speech is not absolute; it is subject to reasonable regulation both for its own preservation and for the furtherance of other overwhelming public interests. *Red Lion Broadcasting Co.* v. *FCC*, 1969, 89 S.Ct. 1794; *Kovacs* v. *Cooper*, 1949, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513; *cf. Tinker* v. *Des Moines Independent Community School Dist.*, 1969, 89 S.Ct. 733. It seems clear that although "pure" speech is to be accorded comprehensive, perhaps even absolute, protection limited only by the clear and present danger test, *see Schenck* v. *United States*, 1919, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470, the protection accorded speech is not so great when it is coupled with "conduct." *Compare Cox* v. *Louisiana*, 1965, 379 U.S. 536, 85 S.Ct. 435, 13 L.Ed. 2d 271, *with Adderly* v. *Florida*, 1966, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149. While recognizing that the "pure-nonpure" dichotomy requires one of the most difficult distinctions that interpretation of the first amendment presents, we find that in the case of "nonpure" speech we are required to balance the

harm done by the overbreadth and vagueness of the statute against the legitimate interests the legislature was seeking to protect, to see whether those interests are so overwhelming as to justify the encroachment. *American Communications Ass'n* v. *Douds*, 1950, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925; *cf.* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-14 (1963). Thus in one recent "speech-plus" case, *Street* v. *New York*, 1969, 89 S.Ct. 1354, 1365, the Supreme Court employed the following analysis:

> In these circumstances, we can think of four governmental interests which might conceivably have been furthered by punishing appellant for his words: (1) An interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.
>
> In the circumstances of this case, we do not believe that any of these interests may constitutionally justify appellant's conviction under § 1425(16)(d) for speaking as he did.

Following the results of its balancing, the Court reversed a conviction for public desecration of the American flag. Similar reasoning was used in *Tinker* v. *Des Moines Independent School Dist.*, *supra*. Other cases show that when speech is coupled with solici-

tation, as it is in the expression § 1714 prohibits, it is no longer pure speech and it is to be tested by the balancing approach. *Brotherhood of Railroad Trainmen* v. *Virginia, supra; cf. Valentine* v. *Chrestensen*, 1942, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262; Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1194-1203 (1965); Comment, *The Brotherhood Case*, 51 VA. L. REV. 1693, 1694-97 (1967).

We must therefore apply the balancing test to this case. To begin with, appellee points out that the expression forbidden by this statute is commercially motivated and argues that this factor differentiates it from the solicitation upheld in the *Button* and *Brotherhood* cases; we agree, but find that in the balance there is nonetheless some protection afforded it by the first amendment. *See* Note, *Freedom of Expression in a Commercial Context, supra.* Appellee also argues that since divorce information does not rise to the same dignity as political expression that affects "governing" rights, it involves a lesser free speech interest. Again we agree, but we note that information on matters of social importance, especially those relating to the marriage relation and the exercise of rights arising from the relation, is also given extensive Constitutional protection. *Griswold* v. *Connecticut*, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. Thus these considerations weaken appellant's claim but do not defeat it.

As to the legislative purpose involved, appellee has of course stated a significant interest by showing the need to prevent fraud in the procurement of foreign divorces. We agree with the trial court that this is the dominant purpose of the statute. At trial, and at some points in its brief, appellee seems to argue that another public interest also underlies § 1714;

that of discouraging divorces and preserving families, or at least that of arrogating to our domestic courts the right to decide when a divorce should be granted. We do not think that this purpose, although an important one, constitutes an interest involved in the case at hand. The trial court dealt effectively with the argument as follows:

> MR. BOYD (counsel for appellee):
>
> Well, the matter of divorce being a matter of such public interest, and public policy, to try to keep families together, that sort of thing, I don't think that the courts intended for [commercial interests] to go around advertising divorce so that they can profit from it, I think that is one of the evils, if you read the legislative history there, maybe you already have, I think that is what they are trying to prevent.
>
> THE COURT:
>
> What disturbs me is that you have a public policy recommending divorce, you have public policy that says people can get a divorce in every State of the Union.[1]

We also feel that an overwhelming Congressional purpose to curb foreign divorces (as distinguished from curbing fraud), if it existed, could be manifested by more effective regulations than a ban on mailing divorce information. Moreover, the purpose of regulating divorces themselves is mentioned only peripherally in both the House and Senate Reports that accompanied the bills that became § 1714. Finally, this prosecution, which is apparently the first under the statute since it was enacted in 1939,

---

[1] The district court, in fact, itself expressed serious doubts as to the Constitutionality of the statute.

stresses heavily the fact that appellant's letters contained misstatements of the law. We conclude that the only overwhelming interest that § 1714 advances is the prevention of fraudulently obtained, invalid divorces.

We hold that this interest does not justify the vagueness and pervasiveness of § 1714. The statute is not "reasonably restricted to the evil with which it is said to deal." *Cf. Butler* v. *Michigan*, 1957, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412. We confine our holding to the single question before us: The constitutionality of a statute prohibiting the mailing of divorce information that is "designed to solicit" business in procuring divorces. We have no doubt that a specific, narrow statute aimed at preventing fraud would be constitutional. Indeed, it might conceivably be constitutional even though written so as to encroach in some small measure on free speech interests, if the encroachment proved absolutely necessary to achieve the result. The possibility of fraud in the procurement of divorces, however, does not justify a statute that makes all mailing of foreign divorce information for business purposes a potential crime.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 25732

D. C. Docket No. 67-496-EP-Cr.

TOMMY HIETT, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Western District of Texas

---

Before THORNBERRY and SIMPSON, Circuit Judges, and CASSIBRY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

August 26, 1969

Issued as Mandate: Sept. 17, 1969

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IN THE

Supreme Court of the United States

October Term, 1969

No. 762

UNITED STATES OF AMERICA,
Petitioner,

versus

TOMMY HIETT,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

LEE A. CHAGRA
Counsel for Respondent
Suite 1200
Southwest Nat'l Bank Bldg.
El Paso, Texas 79901
Mari W. Privette
Of Counsel
1024 First National Tower
Las Cruces, New Mexico 88001

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BRIEF FOR RESPONDENT IN OPPOSITION

ARGUMENT

Accepting Opinions Below; Jurisdiction; Statutes Involved; and Questions Presented, Respondent has no statement of correction and therefore under Supreme Court Rule 40, presents only the Argument showing why the cause should not be reviewed by this Court.

I. REASONS FOR DENYING THE WRIT

At the outset Respondent wishes to stress the soundness of the opinion rendered by the Fifth Circuit Court of Appeals. (App.A, pp. 6-25 of Petitioner's Brief here-

inafter cited simply as App.A) Said opinion meticulously traces the history and present status of the postal power of Congress and the relationship of that power to the first amendment. While calling particular attention to the appellate court opinion, Respondent recognizes that this Court is primarily concerned with whether the case is one in which "there are special and important reasons" for granting the writ of certiorari, as required by Supreme Court Rule 19, and urges those reasons are not present here.

A. The Appellate Court Decision Follows Settled Principles of Constitutional Law.

First finding that Respondent's actual conduct is largely irrelevant because, inter alia, 18 U.S.C. 1714 sets no standards of conduct but indiscriminately prohibits the mailing of certain types of communication without regard to fraudulent intent (App.A, p. 8), the appellate court opinion next considers the postal power. The cases carefully outlined therein show the growth and burial of the privilege doctrine, which this Court surely does not wish to disinter, and then demonstrate that today's permissible use of the postal power is to be tested against the first amendment. This was considered most lately in *Lamont v. Postmaster General*, 1965, 381 U.S. 301.

In accord with the many cases it cited, the Court of Appeals summarized that a statute affecting expression, even if enacted under the postal power, is constitutional only if either (1) it meets the twin tests

of specificity and narrowness or (2) the expression it affects is not protected speech. (App.A, p. 15) As to the latter, the Court aptly remarks that in this one prosecution under the 1939 act, the government contends that an undiscovered lode of unprotected expression has awaited finding in this case. Rejecting that contention in light of the test of unprotected speech as enunciated in *Chaplinsky v. New Hampshire*, 1942, 315 U.S. 568, the opinion cites a number of cases showing that "solicitation" does involve protected speech. (App.A, pp. 16, 17) Next, this criminal statute, which affects protected expression, is found wanting when the classic tests are applied to it. (App.A, pp. 17-21) Nor does the encroachment on speech balanced against the public interest justify the vagueness and pervasiveness of section 1714, although a specific narrow statute aimed at preventing fraud would be constitutional. (App.A, pp. 21-25)

As against the appellate court's scholarly array of cases tracing the development of the postal power and the first amendment cases. Petitioner offers only two in defense of the statute and in support of its reasons for granting the writ of certiorari.

The first of the cases refered to above is *Valentine v. Chrestensen*, 1942, 316 U.S. 52. This case did not concern the postal power but rather a New York ordinance restricting distribution in the city's streets of commercial advertising. This Court held that the stipulated facts justified the conclusion that the affixing of a protest to an advertising circular was with the intent and for the purpose of evading the prohibition of the

ordinance. The case at bar is not answered by *Valentine*, supra, nor is "solicitation" so easily defined as Petitioner urges. Rather, as pointed out by the appellate court, the statute raises many problems, one of which being that it reads so broadly, it would interfere with lawyers attempting to advise clients of their legal rights.

The other case cited by Petitioner is *Connally v. General Const. Co.*, 1925, 269 U.S. 385. In the *Connally* opinion, a statute was held fatally vague, inter alia, because the word "locality" was one without a fixed meaning in itself, or made definite by statutory or judicial definition, or the context, but rather was dependent upon the probably varying impressions of juries. In the instant case "solicitation" was applied by the government to mean the *response* to inquiries which illustrates that this is but one of many interpretations of that word, and not even the dictionary meaning.

Respondent submits that the ruling of the Court of Appeals is based so soundly upon prevailing enunciated principles of constitutional law that this Court need not consider it again.

B. The Case Does Not Merit Certiorari

Since Respondent is the only person ever prosecuted under an act passed in 1939, this case is certainly not one in which "there are special and important reasons" for granting the writ of certiorari as required by Supreme Court Rule 19.

In *Rice v. Sioux City Cemetery*, 1954, 349 U.S. 70, this Court noted that "special and important reasons" means a problem beyond the "episodic." When there has been one prosecution in thirty-one years, the problem does not rise to the level of episodic.

A further reason, in the tenor of the *Rice* opinion, is that the view of the postal power as balanced against the first amendment privilege has changed since the time Congress passed this now outmoded act.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted.

Lee A. Chagra
Counsel for Respondent

Mari W. Privette
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed true and correct copies of the foregoing Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to The Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530.

LEE A. CHAGRA